SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2007

Quick Shop Markets, Inc.
Petitioner,

v.

National Labor Relations Board

and

Retail Store Employees Union, Local 655,
Retail Clerks International Association, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Quick Shop Markets, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 11, 1974.

OPINIONS BELOW

The Order for Enforcement of the Court of Ap-

peals (Pet. App. A, *infra*, pp. 21-23) is unreported. The Decision and Order of the National Labor Relations Board (Pet. App. B, *infra*, pp. 24-36) are reported at 204 NLRB No. 151. The Decision on Review, Order, and Certification of Representative of the National Labor Relations Board in the related representation case (Pet. App. C, *infra*, pp. 37-44) are reported at 200 NLRB No. 120. The hearing officer's report on objections to election (Pet. App. D, *infra*, pp. 45-53) and the Supplemental Decision and Certification of Representative of the Regional Director of the National Labor Relations Board for the 14th Region (Pet. App. F, *infra*, pp. 57-76) are unreported.

JURISDICTION

The judgment of the Court of Appeals, by endorsement on the Order for Enforcement (Pet. App. A, *infra*, pp. 21-23) was entered on April 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

During the final three days of a union representation election campaign among Petitioner's employees, Respondent Retail Store Employees Union, Local No. 655, (Respondent Union) engaged in conduct which included, among others, gross and disproportionate payments to Petitioner's employees who acted as election observers for the Respondent Union, substantial and material misrepresentations of Union wage scales, and electioneering in the polling areas during the voting. Petitioner filed objections to this conduct after Respondent Union's narrow election victory. The Board, after denying Petitioner an evidentiary hearing on all objections except the payment of money to the Union election observers, determined in a 2-to-1 decision (Chair-

man Miller dissenting) that such payment did not preclude a "fair" election. The questions presented are:

1. Whether the Board properly concluded that a Union's payment of money to Petitioner's employees who acted as the union's election observers in amounts in excess of wages lost and expenses incurred tends to interfere with the employee free choice in the election.

2. Whether the Union's material and substantial misrepresentations of union wage scales, where the employer has no adequate time to reply, tend to interfere with the employee free choice in the election.

3. Whether the Board's failure and refusal to consider the cumulative effects of all of the union's conduct renders its findings of fact nonconclusive under § 10(e) of the National Labor Relations Act and thus Court's decision in *Universal Camera Corp v. N.L.R.B.*, 340 U.S. 474.

4. Whether the Board's failure and refusal to grant Petitioner a full evidentiary hearing on all of its objections to the election constituted a denial of due process.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C.151, *et seq.*), are as follows:

> *Section 7* Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right

may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employers, subject to the provisions of Section 9(a).

* * *

Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a), * * *

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

° ° ° If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

° ° °

Section 10

° ° °

(e) ° ° ° The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

REGULATION INVOLVED

The pertinent portion of 29 CFR § 102.69 (a) and (c) as follows:

Section 102.69 Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing. (a) ° ° ° Within 5 days after the tally of ballots has been furnished, any party may file with the regional director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and proof of service shall be made.

(c) If objections are filed to the conduct of the election on conduct affecting the result of the election or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. In either instance, such action

by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer.

STATEMENT

A. PROCEEDING BEFORE THE BOARD

The Petitioner owns and operates in the State of Missuori a number of small drive-in convenience stores which sell sundries and foodstuffs. The bargaining unit involved herein includes 69 convenience stores located in neighborhood shopping centers in the St. Louis Metropolitan area.

1. *The Representation Case*

On June 28, 1971, the Respondent Union filed a petition for a representation election. (Board Case No. 14-RC-6783) (A. 4). On September 29, 1971, pursuant to a Decision and Direction issued by the Regional Director, an election was conducted among the employees in the unit found appropriate (A. 8). The tally of ballots showed that 99 ballots were cast for representation by the Respondent Union, 90 were against such representation, and three were challenged (A. 14). At the time of the election, 209 employees were eligible to vote.

The Petitioner then filed timely objections to the election, alleging, in substance, that (1) the Respondent

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"A" refers to the appendix filed in the Court of Appeals, a copy of which has been filed with the Clerk of this Court.

Union paid its employee election observers to influence their votes; (2) the Respondent Union engaged in electioneering in or near the voting area while employees were voting; (3) the Respondent Union maintained a list of employees who voted; (4) the Respondent Union made wage misrepresentations, which the Petitioner had no time to rebut; and (5) the Respondent Union offered free food and beverages in the election area (A. 11-12, 75).

Pursuant to the Board's Rules and Regulations, series 8, as amended, (29 C.F.R.) Section 102.69, the Regional Director conducted an administrative investigation. Following his investigation, on November 12, 1971, the Regional Director issued a Supplemental Decision and Certification of Representative, wherein he overruled the Petitioner's objections in their entirety and certified the Union (Pet. App. F, *infra*, pp. 57-76). The Petitioner then filed a request for review with the Board, requesting that the certification be set aside and a new election ordered, or alternatively, that a post-election hearing be ordered to resolve issues raised by the Petitioner's objections (A. 25). On January 24, 1972, the Board affirmed the Regional Director's decision, and denied the Company's request for review, on the ground that no substantial issues warranting review had been raised (A. 44). On April 10, 1972, in view of the decision in *N.L.R.B. v. Commercial Letter, Inc.*, 455 F.2d 109 (8th Cir., 1972), the Board granted the Petitioner's motion for reconsideration solely as it related to the Respondent Union's payment of $15 to each of six eligible voters who acted as election observers, and, directed a hearing to resolve this specific issue (Pet. App. E, *infra*, pp.).

Pursuant to the Board's order, an evidentiary hearing was held on May 8, 1972, on this one objection.

Petitioner's offer of evidence on the other objections was rejected. (A. 153-155) The Hearing Officer issued his Report on Objections on July 31, 1972, wherein he found that the Union's payments of $15 to the election observers were not "so grossly disproportionate as to have a tendency to influence the election" and recommended that the Company's objection thereto be overruled (Pet. App. D, *infra*, pp. 45-53). The Company filed timely exceptions to the Hearing Officer's Report (A. 55; 171-175). On December 11, 1972, the Board issued its Decision on Review, Order and Certification of representative, published at 200 NLRB No. 121 (Pet. App. C, *infra*, pp. 37-44), affirming the Hearing Officer's findings and conclusions and certifying the Respondent Union as bargaining representative of the employees.[1]

2. *The unfair labor practice proceeding*

Commencing on January 3, 1973, the Respondent Union requested the Petitioner to recognize and bargain with it; the Petitioner refused. (A. 78). Based on a charge filed by the Union on January 8, 1973, a complaint issued on January 17, 1973, alleging that the Petitioner had refused to bargain with the duly certified bargaining

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[1]Pursuant to the provisions of Section 3(b) of the Act, as amended, the Board delegated its authority to a three-member panel composed of Members Fanning and Jenkins, and Chairman Miller. Chairman Miller, dissenting from the majority opinion, would set aside the election "in order to protect the integrity of our election processes." In his view, "any time an employer or a union offers an observer an extra payment over and above reimbursement at his regular rate of pay plus expenses, there is a lurking danger that, no matter how pure the heart the payor, such payments will be regarded by the recipient as a form of monetary inducement to demonstrate his support of the paying party's choice, and also an inducement to secure his outspoken commitment to vote in the manner desired by the payor" (A. 58-59).

representative of its employees in violation of Section 8(a)(5) and (1) of the Act (A. 59). The Petitioner filed an answer to the complaint on January 27, 1973, admitting its refusal to bargain, but defending on the ground that the certification was invalid basically for the same reasons urged in the representation proceeding (A. 65-70).

Counsel for the General Counsel moved for summary judgment on the pleadings, alleging that the Petitioner's answer admitted all material facts, and that the Petitioner's affirmative defense raised matters previously decided in the representation case (A. 70-71). In its Brief in opposition to the motion for summary judgment, the Petitioner reiterated its objections raised in the representation proceeding, and requested a hearing on its asserted "substantial and material objections" which were not included in the hearing regarding the Respondent Union's payment to the election observers.

The Board in another 2-to-1 decision,[2] granted summary judgment, finding the Petitioner's admitted refusal to bargain with the certified representative of its employees violated Section 8(a)(5) and (1) of the Act (Pet. App. B, *infra*, pp. 24-36). The Board's order required the Petitioner to cease and desist from the unlawful conduct found and from in any like or related manner interfering with its employees' Section 7 rights. Affirmatively, the order requires the Petitioner, upon request, to bargain collectively with the Respondent Union and to post the appropriate notices.

B. The decision of the Court of Appeals.

The Court of Appeals granted enforcement of the

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[2]Chairman Miller dissented for the reasons set forth in his dissent in the underlying representation case (Pet. App. C, *infra*, pp. 43-44).

Board's order, without opinion (Pet. App. A, *infra*, pp. 21-23). The court stated:

> The Company's objection to the election regarding the payment of $15.00 to employee-election observers for four and one-half hours of work at the polls provides in principle an arguable legal issue. We, however, accede to the Board's finding that these payments do not provide a valid objection to the election, and the facts and circumstances of this case do not warrant additional explication of the developing law on this somewhat troublesome issue. We have also reviewed the Company's other objections to the election and conclude that there is substantial evidence on the record as a whole to support the Board's decision. Board's order enforced. See Rule 14 of this court.

REASONS FOR GRANTING THE WRIT

The enforcement of the Board's order by the Court of Appeals is erroneous as to all substantive issues raised before the Court by Petitioner and is in direct conflict with the decisions of other Courts of Appeals on these same issues. The Court of Appeals did not address the procedural issues presented by Petitioner, and, by such omission, did not follow applicable decisions of this Court.

This case presents an uncommonly large number of significant issues. Each issue is a recurrent one in the administration and application of the National Labor Relations Act. For this additional reason, review by this Court is warranted.

Union Payments to Petitioner's Employees

On the basis of this Court's decision in *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270, 94 S. Ct. 495, (1973), Petitioner contended in the Court of Appeals that the

excessive payments to employees by the Respondent Union were improper financial inducements like those which this Court in *Savair* held were destructive of the election atmosphere necessary for a free choice by employees in a representation election.

The decision below conflicts with *Collins & Aikman v. N.L.R.B.*, 383 F.2d 722 (4th Cir. 1967),[3] which is directly in point on the issue of excessive payments to election observers. In that case, the Court of Appeals denied enforcement of the Board's order.

The dissent by Chairman Miller, of the National Labor Relations Board, in the representation case below sums up this issue (Pet. App. C, *infra*, pp. 43-44):

> As set forth in the majority opinion, the Union paid its employee observers an amount equal to approximately twice their usual hourly pay.
>
> In my view, it is bad practice for this Board to sanction payments *by either unions or employers* to an election observer in an amount substantially in excess of reimbursement for time lost for work at the employees' regular rate of pay, plus any expenses the employee might have to incur by reason of his serving as an observer.
>
> The majority opinion rests on what seems to me a difficult and potentially dangerous premise — i.e., that double the employee's regular rate of pay is not "so grossly disproportionate to their usual rate to taint their vote in the election." I do not know whether the majority would consider three times, four times, six times, or twenty times their rate "grossly disproportionate," nor do I think it appropriate to enter upon this kind of quantitative speculation.

[3]Cited with approval by this court in *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270, at n. 6.

> In my view, any time *an employer or a union offers* an observer an extra payment over and above reimbursement at his regular rate of pay plus expenses, there is a lurking danger that, no matter how pure the heart of the payor, such payments will be regarded by the recipient as a *form of monetary inducement to demonstrate his support of the paying party's cause and also as an inducement to secure his unspoken commitment to vote in the manner desired by the payor.*
>
> In order to protect the integrity of our election processes, I would set aside this election and any other one in which payments of this kind were made. (Emphasis supplied) (Pet. App. C, *infra*, p. 43-44)

Chairman Miller presaged this Court's rationale in the *Savair* case, *supra.*

Wage Misrepresentations

The Respondent Union's payments to the six employees were double the wage rates of each such employee. The payments were further represented as "union scale" (Pet. App. C, *infra*, p. 41).

Through last-minute handbills, the Respondent Union represented that its "union scale" was nearly double the wage rate 95% of Petitioner's employees. This "union scale" did not apply to Petitioner's business.[4]

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[4]The Respondent Union wage scale, which the Respondent Union compared with the Petitioner's wage rates, applied to employees in an employment environment wholly distinct from that of Petitioner's. The Respondent Union wage scale was that applicable to supermarkets. Supermarket operations and economics are considerably different from those of the drive-in convenience stores operated by Petitioner. The supermarket relies on high volume with minimum profit margins. The small drive-in convenience store has relatively low volume and relies upon those persons who seek the convenience of the small store over the large

(Continued on P. 13)

Petitioner did not learn of this handbill until after the election.

The second handbill, with a similar misrepresentation, was handed to voters as they entered the polling places.

This representation of union scale was Respondent Union's penultimate attempt to lead Petitioner's employees to believe that voting for Respondent Union would result in a doubling of their hourly rate of pay. The misrepresentation was reinforced by the excessive payments to the election observers.

The decision below conflicts with the growing trend in other circuits on wage misrepresentations. Material wage misrepresentations, where the employer has no adequate opportunity to reply, preclude freedom of choice in an election. *N.L.R.B. v. Trancoa Chemical Corp.*, 303 F.2d 456 (1st Cir. 1962); *N.L.R.B. v. Millard-Metal Service Center, Inc.*, 472 F.2d 647 (1st Cir. 1973); *Cross Baking Co. v. N.L.R.B.*, 453 F.2d 1346 (1st Cir. 1971); *N.L.R.B. v. Cactus Drilling Corp.*, 455 F.2d 871 (5th Cir. 1972); *Thiem Industries, Inc. v. N.L.R.B.*, 489 F.2d 788 (9th Cir. 1973); *N.L.R.B. v. Producers Cooperative Association*, 457 F.2d 1121 (10th Cir. 1972);

(Continued from P. 12)

supermarket. There is an obvious limit to the excess over supermarket prices that a convenience store customer will pay for that convenience. This competition from supermarkets places heavy pressure on the convenience store operator to keep his labor costs as low as possible in order to make a profit. As a result, convenience store industry wage rates (both Union and non-Union) are substantially lower than those in the supermarket industry. This is one reason Petitioner's work force is 95% part-time employees.

Electioneering

At the pre-election conference the day preceding the election, Petitioner and Respondent Union agreed there would be no campaigning on the election day. Respondent Union chose to breach this agreement.

In addition to the wage misrepresentation handbills, the electioneering involved the prominent display of "Vote Yes" placards immediately in front of one polling place and brutish conduct of the Union representatives outside the polling place.

The Regional Director, in a mechanistic approach, found that this conduct did not take place "at or near the polling area." (Pet. App. F, *infra*, p. 62).

By enforcing the Board's order herein, the Court of Appeals for the Eighth Circuit is now at odds with the Court of Appeals for the Fifth Circuit. *Home Town Foods, Inc. v. N.L.R.B.*, 416 F.2d 392 (5th Cir. 1969).

In another case, the Fifth Circuit Court of Appeals held that electioneering, even if not violative of the law, warrants setting aside an election when it breaches a campaign moratorium agreement resulting in actual prejudice to the employer. *Tyler Pipe Industries, Inc. v. N.L.R.B.*, 447 F.2d 1136 (5th Cir. 1971).

The electioneering bolstered the wage misrepresentation confusion by puzzling the employees about the Petitioner's absence from the polling place.

Many of the employees who encountered this situation wondered aloud why the Union was campaigning and the Petitioner was not (A. 25-40). A natural assumption would be that the Company really did not care about those employees who wished not to be represented by the Union.

National Labor Relations Board Chairman Miller, again dissenting, would strictly enforce the Board's rules against electioneering. *The Mead Corporation*, 189 NLRB 190, n.1 (1971).

Tally Keeping

Even if otherwise benign, the electioneering activity at the polling places is made malignant by the Union representatives appearing to maintain a list of voters. (A. 19-20, 38-40) The Board would require Petitioner to show that employees knew that their names were being taken by the Union representatives stationed in front of the polling place.

The recent case of *N.L.R.B. v. Janler Plastic Mold Corp.*, 82 LRRM 2174 (7th Cir. 1972) (not officially reported), had the court deny enforcement where a Union adherent kept a running tally of the balloting. The surveillant stationed himself at his workbench near the polling areas. There is no evidence that voters saw anything other than the surveillant watching them and writing. When the last employee voted, the surveillant remarked to other employees "This is the one — this is the last vote that will decide it."

> Since Janler's employees were *presumably* aware that Kovacs was watching the voting area and keeping track of the votes, they may have been influenced in their voting. *Id.* at 2176 (Emphasis supplied)

Cumulative Effect

A growing number of Courts of Appeals[5] have required the Board to consider the cumulative effect, or the totality of conduct, of the miscreants'

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[5]*N.L.R.B. v. Trancoa Chemical Corp.*, 303 F.2d 456 (1st Cir. 1962); *Tyler Pipe Industries, Inc. v. N.L.R.B.*, 447 F.2d 1136

(Continued on P. 16)

activities in an election. The Board, with apparent approval of the court below, again failed and refused to weigh the total conduct of Respondent Union as a single whole.

The obligation of the courts is to consider as conclusive only those findings of fact made by the Board which are supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). This Court interpreted this section of the National Labor Relations Act in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1941):

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.
>
> "There remains then the question whether enactment of these two statutes has altered the scope of review other than to require that *substantiality be determined in light of all that the record relevantly presents.*" 340 U.S. at 488 (Emphasis Supplied)

Petitioner submits that to not consider the cumulative effect of misconduct is a failure to consider all that the record relevantly presents.

By viewing each element of alleged misconduct herein in isolation disestablishes what Respondent Union was in fact doing during the last three days of a three-month Union campaign. The strategy was to mislead

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(Continued from P. 15)

(5th Cir. 1971); *N.L.R.B. v. Janler Plastic Mold Corp.*, 82 LRRM 2174 (7th Cir. 1972) (Not officially reported); *N.L.R.B. v. Winchell Processing Corp.*, 451 F.2d 306 (9th Cir. 1971)

and confuse the voters—mislead about wages, a matter of paramount importance to most of them, and confuse the voters about the secrecy of their ballot and the interest of the Petitioner in their well-being.

The timing was calculated to prevent Petitioner from making any response in support of those who opposed the Union.

Few, if any, unions will present facts unfavorable to their organizing efforts. To balance the situation, employees must look to their employer as the primary source of these other facts.

To deny the employees opposed to the Union access to these facts is to prevent the balance of Section 7[6] rights required by this Court in *N.L.R.B. v. Savair Manufacturing Company*, 414 U.S. 270 (1973) and *N.L.R.B. v. Magnavox Company of Tennessee*, ___ U.S. ___, 94 S. Ct. 1099 (1974) (No. 72-1637).

Procedural Due Process

Another significant issue in this case involves the denial of procedural due process by refusing Petitioner an adversary hearing before the Board on Petitioner's objections to the Respondent Union's election conduct.

The administrative conduct of the Regional Director in this case illustrates the serious shortcomings of the Board's procedures in representation cases. (Section 102.69(d), Rules and Regulations of the National Labor Relations Board, Series 8, as amended.)

The court below, in a prior decision, has recognized these shortcomings:

. . . After the objections are filed the employer

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[6]29 U.S.C. § 157.

> has no part in the investigation. There are no provisions in the statute or the regulations which provide for notice to him or any other party that the investigation has commenced and no procedure by which one can submit evidence. Most importantly, there is no procedure by which the truth of the statements made by opposing party can be tested by cross-examinations and credibility judged by examination under oath. 'Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.' *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U.S. at 28. Certainly the Board relied on the evidence which its investigation produced to overrule the objections and certify the Union, but it is apparent that the employer was foreclosed from the opportunity of producing evidence that might rebut the statements made by the Union, or subjecting these self-serving statements to the cleansing rigors of cross-examination. . . . *N.L.R.B. v. Commercial Letter, Inc.*, 455 F.2d 109, at 113 (8th Cir. 1972).

The Regional Director, in essence, sits as Judge, jury, prosecutor, and defender. The objecting party must lift himself by his own bootstraps.

In order to earn an evidentiary hearing, the objecting party must present evidence sufficient to create substantial and material factual issues. Yet, he must do this with no access to any of the evidence presented to the Regional Director by the adverse party. The objecting party, therefore, must assume the character and nature of the evidence presented and attempt to rebut the unknown. Neither does the objecting party have the opportunity to confront witnesses for the adverse party or test their credibility.

By such "proceedings" the Section 7 rights of employees may be forever foreclosed on the basis of contrivances and falsehoods.

Petitioner even attempted to present evidence through the testimony of witnesses which the Regional Director refused and failed to take. (A. 168-169)

Several Courts of Appeals have recently discussed this procedural shortcoming.[7] This Court has not addressed itself to the issue for over thirty years. *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U.S. 9 (Sup. Ct. 1943).

Petitioner submits that this issue constitutes an important question of federal law which should be settled by this Court.

CONCLUSION

N.L.R.B. v. Savair Manufacturing Company, 414 U.S. 270 (1973) required the National Labor Relations Board to balance the rights of *all* union election voters.

The Board's decision herein is yet another example of its dual standard of treatment or organizing campaign misconduct. The Board has not denied Petitioner's repeated contention that the election would have been set aside if the Petitioner had engaged in the conduct attributed to Respondent Union.

The Court of Appeals below recognized, but did not respond to, the problem.

> "° ° ° [T]he facts and circumstances of this case do not warrant additional explication of the *developing* law on this somewhat *troublesome* issue." (Pet. App. A, p. 22) (Emphasis Supplied)

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[7] *N.L.R.B. v. G. K. Turner Associates*, 79 LRRM 2932 (9th Cir. 1972); *N.L.R.B. v. Janler Plastic Mold Corp.*, 82 LRRM 2174 (7th Cir. 1972) (Not officially reported); *Gulton Industries, Inc. v. N.L.R.B.*, 469 F.2d 1371 (5th Cir. 1972); *N.L.R.B. v. Millard Metal Service Center, Inc.*, 82 LRRM 2345 (1st Cir. 1972).

The facts and circumstances of this case may be unusual because the Respondent Union's conduct embraces the four non-violent campaign abuses most frequently committed by Unions:

1) Financial inducements to voters;
2) Substantial wage rate misrepresentations;
3) Misconduct at the polling place; and
4) Impressing upon voters that the Union knows how they voted.

As to each of these, the Eighth Circuit Court of Appeals is now in conflict with other Courts of Appeals.[8] Among the various Courts of Appeals that have decided the issue, only the Court below has failed to require the Board to weigh and decide the cumulative effect of such misconduct. Such failure also appears to be contrary to this Court's decision in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

These errors of the Board and the Court of Appeals are compounded when the Petitioner is denied an adversary hearing on its objections. The Union cannot be expected to protect the rights of those employees who oppose its organizing efforts.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. KOTHE
RICHARD LEE BARNES
124 East Fourth Street
Tulsa, Oklahoma 74103

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[8]There is pending in the Court of Appeals for the Sixth Circuit a Petition for Review of an N.L.R.B. Order refusing to set aside an election because of excessive payment of an election observer. *Plastic Masters, Inc. v. N.L.R.B.*, No. 74-1152. The Board relied on its previous decision in *Quick Shop Markets* for which review is sought herein.

APPENDIX A
Order Of Enforcement Of The Court Of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1699

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
and
RETAIL STORE EMPLOYEES UNION,
LOCAL 655, RETAIL CLERKS
INTERNATIONAL ASSOCIATION,
AFL-CIO,
Intervenor,

v.

QUICK SHOP MARKETS, INC.,
Respondent.

On Application for Enforcement of an Order of The National Labor Relations Board

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Submitted: Marcy 11, 1974
Filed: March 15, 1974

Before GIBSON, BRIGHT, AND STEPHENSON,
Circuit Judges.

ORDER OF ENFORCEMENT

The National Labor Relations Board petitions this

court for enforcement of its order issued on July 23, 1973, against respondent Quick Shop Markets, Inc. (the Company) and reported at 204 NLRB No. 151. The order requires the Company to bargain collectively with the Retail Store Employees' Union, Local No. 655, of the Retail Clerks International Association, AFL-CIO, and to post appropriate notices.

The Company filed timely objections to a representation election won by the Union and alleged that the Union excessively paid employee-election observers in order to influence their votes, that the Union unlawfully engaged in electioneering in the voting area, that the Union kept a tally of the employees who voted, and that the Union misrepresented Union wages in campaign literature. The Company's objections were overruled in their entirety and the Union was certified by the Regional Director, whose decision was first upheld by the Board in its Decision on Review published at 200 NLRB No. 121, with Chairman Miller dissenting.

The Company's objection to the election regarding the payment of $15.00 to employee-election observers for four and one-half hours of work at the polls provides in principle an arguable legal issue. We, however, accede to the Board's finding that these payments do not provide a valid objection to the election, and the facts and circumstances of this case do not warrant additional explication of the developing law on this somewhat troublesome issue. We have also reviewed the Company's other objections to the election and conclude that there is substantial evidence on the record as a whole to support the Board's decision. Board's order enforced. See Rule 14 of this court.

A true copy.

(See attached sheet for cost information)

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

Costs taxed in favor of National Labor Relations Board in Case No. 73-1699:

Costs of printing 10 copies of Appendix:	$ 278.60
Costs of printing 25 copies of Brief of National Labor Relations Board:	$ 931.40
Total costs of Labor Board for recovery from Quick Shop Markets, Respondent:	$ 1,210.00

APPENDIX B

Decision And Order Of National Labor Relations Board

MFP

204 NLRB No. 151

D — 7599
St. Louis, Mo.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL
LABOR RELATIONS BOARD

Case 14 — CA — 7197

QUICK SHOP MARKETS, INC.
and
RETAIL STORE EMPLOYEES'
UNION, LOCAL NO. 655,
affiliated with RETAIL
CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO

DECISION AND ORDER

Upon a charge filed on January 8, 1973, by Retail Store Employees' Union, Local No. 655, affiliated with Retail Clerks International Association, AFL-CIO, herein called the Union, and duly served on Quick Shop Markets, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14, issued a complaint on January 17, 1973, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before

an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 11, 1972, following a Board election in Case 14—RC—6783 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about January 3, 1973, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 27, 1973, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 7, 1973, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 12, 1973, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted.[2] Respondent thereafter filed a brief in opposi-

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[1]Official notice is taken of the record in the representation proceeding, Case 14—RC—6783, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 N.RB 151, enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

[2]The General Counsel's Motion To Correct Item 11 of Exh. 3 attached to his brief in support of the Motion for Summary Judgment is granted and the word "not" is deleted from item 11

(Continued on P. 26)

tion, as its response to Notice To Show Cause, a Motion To Remand, and a Motion for Oral Argument and Permission To File Amicus Briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:[3]

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Motion for Summary Judgment, the Respondent attacks the Union's majority status and certification on the grounds that it was denied due process in not receiving a hearing on its objections to the election in Case 14-RC—6783 and that the Board erred, as a matter of law, in concluding that the Union's payments to its employee election observers and its wage misrepresentation did not interfere with the laboratory conditions of the election. The General Counsel argues that the Respondent is attempting to litigate representation case issues previously raised and determined by the Board and that they may not be relitigated herein. We agree with the General Counsel.

(Continued from P. 25)

of exh. 3 so as to have it read "a majority of the valid votes counted plus challenged ballots (Item 9) has been cast for the [Union]."

[3]The Respondent's request for oral argument and for permission to file *amicus* briefs is hereby denied, as, in our opinion, the record, including the record in Case 14—RC—6783, the briefs, and motions filed herein adequately present the issues herein and the positions of the parties.

In pertinent part, our review of the record in Case 14—RC—6783 reflects that in the September 29, 1971, election conducted pursuant to the Regional Director's Decision and Direction of Election, the Union won a majority of the votes cast. Thereafter, the Respondent filed timely objections to the results of the election. In substance the objections alleged that (1) the Union paid its employee election observers to influence their votes; (2) the Union engaged in electioneering in or near the voting area while employees were voting; (3) the Union maintained a list of employees who voted; (4) the Union made wage misrepresentations, which the Respondent had no time to rebut; and (5) the Union offered free food and beverages in the election area.

After conducting an investigation, the Regional Director, on November 12, 1971, issued his Supplemental Decision and Certification of Representative in which he overruled the objections in their entirety and certified the Union. On January 25, 1972, the Board denied the Respondent's request for review. Thereafter, on April 10, 1972, the Board granted the Respondent's Motion for Reconsideration of the denial of the request for review only insofar as it related to the objections pertaining to payments by the Union to eligible voters acting as election observers, and directed an evidentiary hearing to resolve the issues raised by the Union's payments.

After a hearing in which all parties participated and were given full opportunity to introduce evidence and to examine and cross-examine witnesses, the Hearing Officer issued his report in which he found that the payments did not interfere with the election and recommended that the Respondent's objections relating to the payments by the Union to its observers be overruled. The Respondent filed timely exceptions to the Hearing Officer's report and requested oral argument and a new

hearing. In its Decision on Review, Order, and Certification of Representative of December 11, 1972 (200 NLRB No. 120), the Board (1) denied the Respondent's requests for oral argument, a new hearing, and the filing of *amicus* briefs, (2) adopted the Hearing Officer's findings and recommendations, (3) overruled the Respondent's objections, and (4) certified the Union. Chairman Miller, dissenting, would have set the election aside on the payments made by the Union to its employee observers.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

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[4]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

Respondent is a Missouri corporation with its principal office and place of business in the county of St. Louis, Missouri, and with other places of business in Missouri. It is engaged in the retail sales of groceries, meat, and related food products.

During the year ending December 31, 1972, a representative period, the Respondent derived gross revenues in excess of $500,000 and purchased and caused to be transported and delivered to its Missouri places of business goods and materials valued in excess of $50,000, which were received from other enterprises in Missouri, each of which other enterprises had received said goods and materials directly from points located outside of Missouri.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Retail Store Employees' Union, Local No. 655, affiliated with Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All employees of the Respondent employed at its retail stores located in the Metropolitan St. Louis area of St. Louis city, St. Louis County, Jefferson County and St. Charles County, Missouri, including warehousemen, but excluding store managers, assistant store managers, temporary summer employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

2. The certification

On September 29, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 14, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 11, 1972, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about December 20, 1972, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective bargaining representative of all the employees in the above-described unit. Commencing on or about December 20, 1972, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since December 20, 1972, and at all times thereafter, refused to bargain collectively with the Union as the exclusive

representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Quick Shop Markets, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Store Employees' Union, Local No. 655, affiliated with Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of the Respondent employed at its retail stores located in the Metropolitan St. Louis area of St. Louis city, St. Louis County, Jefferson County and St. Charles County, Missuori, including warehousemen, but excluding store managers, assistant store managers, temporary summer employees, office clerical and professional employees, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 11, 1972, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 20, 1972, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent

has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Quick Shop Markets, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees' Union, Local No. 655, affiliated with Retail Clerks International Association, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees of the Respondent employed at its retail stores located in the Metropolitan St. Louis area of St. Louis city, St. Louis County, Jefferson County and St. Charles County, Missouri, including warehousemen, but excluding store managers, assistant store managers, temporary summer employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Missouri places of business copies of the attached notice marked "Appendix".[5] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.: JUL 23 1973

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[5]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

CHAIRMAN MILLER, dissenting:

In the Decision on Review, Order, and Certification of Representative in Case 14—RC—6783, the panel majority refused to set aside the election during which the Union paid its employee election observers an amount equal to approximately twice their usual hourly pay. I dissented because, in order to protect the integrity of our election processes, I would have set aside the election and any other one in which payments of that kind were made. Accordingly, I would deny the General Counsel's Motion for Summary Judgment and dismiss the complaint.

Dated, Washington, D.C.: JUL 23 1973
Edward B. Miller, Chairman
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees' Union, Local No. 655, affiliated with Retail Clerks International Association AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees of the Respondent employed at its retail stores located in the Metropolitan St. Louis area of St. Louis city, St. Louis County, Jefferson County and St. Charles County, Missuori, including warehousemen, but excluding store managers, assistant store managers, temporary summer employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

QUICK SHOP MARKETS, INC.

_____

(Employer)

Dated _____ By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 210 North 12th Boulevard, Room 448, St. Louis, Missouri 63101, Telephone 314-622-4167.

APPENDIX C

Decision On Review, Order And Certification Of Representative Of The National Labor Relations Board

200 NLRB No. 120

D — 7019
St. Louis, Mo.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL
LABOR RELATIONS BOARD

Case 14 — RC — 6783

QUICK SHOP MARKETS, INC.
Employer
and
RETAIL STORE EMPLOYEES' UNION
LOCAL NO. 655 a/w RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO
Petitioner

DECISION ON REVIEW, ORDER, AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 14 of the National Labor Relations Board, an election was conducted under his supervision on September 29, 1972, among the employees in the unit found appropriate.[1]

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[1]All employees of the Employer employed at its retail stores located in the Metropolitan St. Louis area of St. Louis City, St. Louis County, Jefferson County, and St. Charles County, Missouri, including warehousemen, but excluding store managers, assistant store managers, temporary summer employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 209 eligible voters, 192 cast ballots, of which 99 were for, and 90 were against, Petitioner, with 3 challenged ballots. The challenged ballots are not sufficient to affect the results of the election. Thereafter, the Employer filed timely objections to the results of the election.

The Regional Director, in accordance with National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, conducted an investigation and, on November 12, 1971, issued and served upon the parties his Supplemental Decision, wherein he overruled, in their entirety, the Employer's objections. Thereafter, on December 6, 1971, the Employer filed with the Board a request for review of the Supplemental Decision and Direction of Election with respect to all of the objections. The Board denied the request for review on January 24, 1972. Thereafter, on February 3, 1972, the Employer filed a motion for reconsideration of the Board's denial of its request for review and, thereafter, the Petitioner filed opposition to the motion. On April 10, 1972, the National Labor Relations Board issued an Order granting Employer's motion for reconsideration as it relates to the Petitioner's payments to eligible voters who acted as election observers and directing a hearing to obtain evidence to resolve the issues raised by the Petitioner's payments.

The Board in its Order granting a hearing found that the instant proceedings raised issues arguably similar to those ordered to hearing by the court in *N.L.R.B. v. Commercial Letter, Inc.*, 455 F.2d 109 (1972). The court found that when a union subpenaed 8 of the unit's 12 employees for a representation case hearing

held on June 5 and 19, 1970, with no indication that their presence was necessary, and paid them, within 15 days before the election, an amount equal to their lost wages, the payments on their face are questionable and substantial factual issues are raised that should be further investigated, calling for a hearing.

Pursuant to the Board's Order, a hearing was held on May 8, 1972, before William T. Coleman, Hearing Officer. All parties participated in the hearing and were given full opportunity to examine and cross-examine witnesses and to introduce evidence bearing on the issues. On July 31, 1972, the Hearing Officer issued and duly served upon the parties his report on objections. In his report, the Hearing Officer found that the Petitioner's payments to eligible voters who acted as election observers did not interfere with the election and recommended that the Employer's objections to the election held on September 29, 1971, insofar as they relate to payments by the Petitioner to its observers, be overruled. Thereafter, the Employer filed timely exceptions to the Hearing Officer's report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed.[2]

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[2]The Hearing Officer correctly denied the Employer's request that it be allowed to question its witnesses under Federal Rules of Civil Procedure, Rule 43b, inasmuch as the Hearing Officer found that the witnesses were answering all the questions completely and the Employer never attempted to show that they were either hostile or unwilling.

The Board has considered the Regional Director's Supplemental Decision, the Employer's request for review, the Employer's motion for reconsideration, and the entire record[3] in the case, and hereby adopts the Hearing Officer's findings and recommendations.

The Hearing Officer found that there were no union requests that the payments serve as an inducement to influence employees votes, that none of the observers considered the payments as inducements, and that the payments were not so grossly disproportionate as to influence the employees, and that therefore the Employer's burden of proof as the objecting party has not been met.

The Employer, in its exceptions to the Hearing Officer's report, argues that the Union's payment of $15 to six eligible voters for their services as election observers represented such a large sum to these employees that it must have influenced their vote and that the Union should have had the burden of proof. The Employer, in its exceptions, also raises for the first time the allegation that the payments were part of a deliberate union attempt to misrepresent the union wage scale. We disagree.

The Union paid six eligible voters $15 for their services as election observers. The Union did not suggest to the observers that the payments should influence their vote and the six observers testified that they would have voted the same regardless of the payments. At the time of the election the union observers be-

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[3]The Employer's request for oral argument and the filing of *amicus* briefs is hereby denied as in our opinion the record, including the briefs, adequately presents the issues herein and the positions of the parties. For like reasons the Employer's request for a new hearing is denied.

lieved that they would only be paid by the Union; only after the election did the Employer decide also to pay the Union's observers as if they had worked their regular hours.

The union observers worked approximately 4½ hours as observers; most, but not all of the observers were assigned to polling places that were less accessible than their regularly assigned work locations. One of the observers was driven by the Union to and from the polling area and one was driven part way to and from the polling area. The observers' regular pay was between $1.60 and $1.75 an hour.

The Union told one observer that the $15 was its usual payment for observers, three were told that it was only a payment for their services as observers without an explanation on how the amount was computed, one was told it was union scale, and one was told approximately 2 days before the election that the $15 was the amount union employees were paid for approximately 4½ hours work. The Employer claims that this misrepresented the union scale by between 28% and 54%.[4]

Our dissenting colleague finds objectionable any payments to an observer greater than his normal rate of pay plus expenses. Because an observer is not, as an

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[4]The Employer contends that, since most of the eligible voters were part-time employees, the Union's grocery division's recently signed contract giving $2.60 per hour for part-time employees should be compared with the Union's actual payments of $3.33 per hour ($15 for 4.5 hours), resulting in a misrepresentation of $.73 or 28%. The Employer also contends that its employees could be compared to bagger-carryout employees who earn $2.10 per hour, resulting in a misrepresentation of $1.23 per hour or 54%.

observer, doing what he usually does, there is no logical basis for saying the two jobs must be paid at the same rate. This is not to say that there is no relationship between the two and we see no reason not to compare them to decide whether there is so gross a disproportion as to establish a taint. Our dissenting colleague thinks it inappropriate to indulge in what he calls quantitative speculation. We would rather say that the question, like many questions in the law, is one of degree, and this Board constantly makes judgments on such questions.

We find that the $15 payments, although approximately twice the observers' usual pay for 4½ hours when engaged in their customary duties for the employer, were not so grossly disproportionate to their usual pay rate or to what the Union could reasonably consider was the value of their 4½ hours work as observers; that possible misrepresentations made approximately 2 days before the election to one or two of 209 eligible voters are not sufficient to overturn the election; and that the Hearing Officer correctly placed the burden of proof on the Employer as the objecting party.

Accordingly, as we have overruled the Employer's objections to the election, held on September 29, 1971, insofar as they relate to payments by the Petitioner to its observers, and as the Petitioner received a majority of the valid ballots cast in the election, we shall certify it as the representative of the employees in the unit found appropriate.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Retail Store Employees' Union Local No. 655 a/w Retail Clerks International Association, AFL-CIO, and that, pursuant to Section 9(a) of

the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Dated, Washington, D.C.: DEC 11 1972

John H. Fanning, Member
John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

CHAIRMAN MILLER, dissenting:

As set forth in the majority opinion, the Union paid its employee observers an amount equal to approximately twice their usual hourly pay.

In my view, it is bad practice for this Board to sanction payments by either unions or employers to an election observer in an amount substantially in excess of reimbursement for time lost for work at the employees' regular rate of pay, plus any expenses the employee might have to incur by reason of his serving as an observer.

The majority opinion rests on what seems to me a difficult and potentially dangerous premise — i.e., that double the employee's regular rate of pay is not "so grossly disproportionate to their usual rate to taint their vote in the election." I do not know whether the majority would consider three times, four times, six times, or twenty times their rate "grossly disproportionate," nor do I think it appropriate to enter upon this kind of quantitative speculation.

In my view, any time an employer or a union offers

an observer an extra payment over and above reimbursement at his regular rate of pay plus expenses, there is a lurking danger that, no matter how pure the heart of the payor, such payments will be regarded by the recipient as a form of monetary inducement to demonstrate his support of the paying party's cause and also as an inducement to secure his unspoken commitment to vote in the manner desired by the payor.

In order to protect the integrity of our election processes, I would set aside this election and any other one in which payments of this kind were made.

Dated, Washington, D.C.: DEC 11 1972

Edward B. Miller, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX D

Hearing Officer's Report On Objections

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

Case No. 14-RC-6783

QUICK SHOP MARKETS, INC.
Employer
and
RETAIL STORE EMPLOYEES' UNION
LOCAL NO. 655, a/w RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO
Petitioner

Michael S. Maram, Esq., for the
National Labor Relations Board's Regional Office,
Fourteenth Region

Charles A. Kothe, Esq., and *Jerry R. Nichols, Esq.*,
for the Employer

Marvin G. Marshall, Esq., for the Petitioner

Before: William T. Coleman, Hearing Officer

HEARING OFFICER'S REPORT ON OBJECTIONS

Upon a petition filed on June 28, 1971, and upon the Regional Director's Decision and Direction of Election dated August 20, 1971, an election was held on September 29, 1971, among certain employees of the Employer. Thereafter the Employer filed timely objections. In a Supplemental Decision dated November 12, 1971, the Regional Director of the Fourteenth Region overruled the Employer's objections and certified the

Union as the collective bargaining representative of the unit in question.

On December 6, 1971, the Employer filed with the Board a request for review. On January 25, 1972, the Board denied this request. On February 3, 1972, the Employer filed with the Board a motion for reconsideration. The Petitioner filed its opposition to this motion. On April 10, 1972, the Board issued an order granting review and directing a hearing with respect to the Employer's objection relating to the Petitioner's payments to eligible voters who acted as election observers. Pursuant to this order, a hearing was held before me at St. Louis, Missouri, on May 8, 1972. At this hearing all parties were represented by counsel and were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence and to argue orally. Upon request, both parties were granted time to file briefs.

I have given the Employer's brief due consideration in arriving at the findings of fact and recommendations. After receipt of the Employer's brief, I received three additional letters making references, responses and supports to the Employer's arguments in its brief. I have considered each of these letters as motions to file instanter the arguments recited therein. I hereby grant the motion and state that I have considered all of the letters in arriving at this decision. I did not find any of them persuasive. The Employer's motion to strike the Petitioner's letter of May 18, 1972, is denied.

The findings of fact herein are based upon my consideration of the entire record and, with the exception of Philip F. Heilman, based upon my observation of each of the witnesses who testified. Mr. Heilman's testimony was reduced to writing in the form of sworn answers to interrogatories and filed as an exhibit.

THE EVIDENCE PRESENTED AND FINDINGS OF FACT

(a) *General*

An election was held on September 29, 1972, at six of the Employer's retail stores in the Metropolitan St. Louis area. The polls were open from 6:00 p.m. to 10:00 p.m. At each election site each party had one observer. The six observers of the Employer are not in issue here.

Except for one instance of a minor coffee break, each observer was present at the polls during the voting period, plus about 15 minutes before and after the polling period. I thus find that each observer for the Petitioner worked approximately 4½ hours as an observer.

(b) *The Payments to Eligible Observers*

Each of the six observers for the Petitioner were paid $15.00 for their services as union observers at the September 29, 1971 election. Each were paid this amount by a check dated October 1, 1971. Five observers received this check in the mail shortly after October 1. One observer, Philip F. Heilman, evidence of whom was submitted by written interrogatories and answers thereto, does not state how he received the check. Since there is no evidence as to how he received it, as all the checks were prepared in sequence on the same day and signed by the same person, it is a fair inference that he, too, received his check in the mail shortly after October 1, 1971, and I so find.

Moreover, each of the six observers for Petitioner were paid by the Employer for 4½ hours at their regular rate. The Employer decided to compensate them for their time one day after the election. Since the remaining circumstances vary slightly as to each observer, it is necessary to discuss them individually.

(1) *John Hughes*

Mr. Hughes was a union observer at the Employer's St. Charles Rock Road store. He is 19 years old, a college student and a part-time stockboy. A few days before the election he was asked by Mr. Bob Kelly, union business agent, if he wanted to make $15.00 working as an election observer for the Union. At that time Mr. Hughes was paid $1.75 by the Employer for his duties as a part-time stockboy in the No. 2 store. Hughes testified that he considered the payment generous, but he thought he had earned it. In addition, he testified that no one from the Union made any other statement to him concerning his duties as an observer, or his actions as a voter; in particular no one from the Union suggested to him how he should vote. He also testified that he would have voted the same had he not served as an observer. In the absence of any evidence to the contrary, I credit Hughes and so find.

(2) *Charles Bredwell*

Mr. Bredwell served as an election observer at the Employer's stores on West Florissant Avenue. He, too, is 19 years old. He also worked as a part-time employee earning about $1.60 per hour from the Employer. He was first asked to be an observer about two weeks before the election by union representative George Fajardo. When he learned of the amount of money he would earn as an observer, he testified, he thought it was high. He characterized his reaction as "Wow." However, he testified that he was not told by anyone that the $15.00 should influence his vote, and further testified that he would have voted the same way, regardless of his services as an observer, or the payment to him. In the absence of any testimony to the contrary, I credit the testimony of Charles Bredwell and so find.

(3) *Timothy Simones*

Mr. Simones served as the Union's observer for the election at the Employer's store in St. Charles, Missouri, a St. Louis suburb. He, too, is 19 years old.

About two days prior to the election, he received a phone call from Bob Kelly, union business representative. The latter asked Simones whether he wanted to be a union election observer, and informed him that he could earn $15.00 for his services. Simones replied that he would. He was dirven to the election part way by two union representatives; he returned part way with them as well. He testified that he would have voted in the election anyway, and that his vote would have been the same.

At the time of the election, Simones was earning $1.70 per hour as a full-time stock clerk. He had never received $15.00 for four or five hours of work before. He further testified that no one told him or suggested to him that the $15.00 payment should influence his vote. He further testified that this payment of money did not influence his vote. In the absence of any evidence to the contrary, I credit this testimony, and so find.

(4) *Margaret Allbright*

Margaret Allbright served as a union observer in the Employer's store in the Collinade Center near St. Louis, Missouri. At the time she was a cashier for the Employer earning $1.75 per hour. Approximately two or three weeks before the election, Mr. George Fajadro, union business representative, called Mrs. Allbright and asked her if she would be willing to work as an election observer. He further advised that she would be paid $15.00 for her services. She replied in the affirmative.

Mrs. Allbright further testified that neither Fajardo nor anyone else from the Union told her or suggested to her that the $15.00 payment should influence her vote. She further testified that the payment did not by itself influence her vote, and that she would have voted the same regardless of the $15.00 payment. In the absence of evidence to the contrary, I so find.

(5) *Jane Fitzgerald*

Mrs. Jane Fitzgerald served as a union observed in the Employer's No. 6 store at 711 Union Road, St. Louis, Missouri. She also worked in this store as a part-time clerk and was, at the time of election, earning $1.60 per hour. She was asked to be an observer about two days before the election when about two days before the election union representatives Kelly and Fajardo entered the store where Mrs. Fitzgerald was working. They asked her whether she would be an observer for the Union. She responded yes. At some point in this conversation, Fajardo told her that she would be paid about $15.00 for her services.

Mrs. Fitzgerald further testified that the money did not influence her vote, that she would have voted anyway, and that her vote would have been the same regardless of the payment of $15.00. Moreover, she testified that no one from the Union told her that the $15.00 should influence her vote. In the absence of evidence to the contrary, I so find.

(6) *Philip F. Heilman*

The evidence relating to this observer is based upon a four page exhibit labeled "Answers to Interrogatories." Although the last page of the exhibit contains a recitation that the answers are given under oath, there is an absence of the commonly-affixed notarial seal and subscription. However, I accept the exhibit as stating what

it purports to be because it is apparently corroborated by the testimony, under oath, of the other five observers.

Upon the basis of this exhibit and the corroborating testimony of the five other observers who testified under oath, I find the following:

Philip F. Heilman served as an election observer for the Union at the Employer's No. 29 store. He was paid $15.00 by check in return for his services.

I further find that he would have voted at the election even if he had not acted as an observer. There is no evidence that anyone from the Union suggested to him or told him how he should vote, or that his vote was influenced by the amount of money paid.

CONCLUSIONS AND RECOMMENDATIONS

In hearings on objections to the conduct of election, the burden of proof is upon the objecting party, in this case the Employer. *N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123, 47 LRRM 2437 (1961). Payments, by themselves, to union election observers do not warrant setting aside an election. *Shoreline Enterprises of America*, 114 NLRB 716 (1955). The Union is entitled to pay its observers a "reasonable sum for 'services rendered.'" *Collins & Aikman Corp. v. N.L.R.B.*, 383 F. 2d 722, 66 LRRM 2280 (4th Cir. 1967).

The standards to be applied in determining whether payments to union observers should set aside the election is governed by two cases: *N.L.R.B. v. Commercial Letter, Inc.*, ____F. 2d ____, 79 LRRM 2267 (8th Cir. 1972) and *Collins & Aikman Corp. v. N.L.R.B.*, 383 F. 2d 722, 66 LRRM 2280 (4th Cir. 1967).

In *Collins & Aikman*, the Fourth Circuit concluded that an election should be set aside where the Union had promised an observer a full day's pay for one and

one-half hours of work as an election observer. This amounted to a promise of seven times the amount of his pay. In fact, he was only paid half of what was promised. Nevertheless, the Court held that such promises undoubtedly had a tendency to influence the election results.

In a subsequent case, *N.L.R.B. v. Commercial Letter, Inc.*, ____ F. 2d ____, 90 LRRM 2267 (8th Cir. 1972), the Court of Appelas for the Eighth Circuit labeled the payment in *Collins & Aikman* as "grossly disproportionate," and held that such payments should cause an election to be set aside.

There is no evidence in this record of any actual requests to have the payments serve as an inducement to influence an employee's vote. There is no evidence that any of the six election observers considered the payments as such. The remaining question is, then, whether the payments by themselves, or the promises of the $15.00 payments, were so grossly disproportionate as to have a tendency to influence the election.

Each observer worked 4½ hours at the election site for his services as an observer. Payment by the Union therefore amounts to $3.33 per hour. In the case of the observers who earned $1.60 per hour, this amounts to a little more than twice their hourly pay. In the case of observers who earned $1.70 and $1.75, this amounts to almost, but not quite, twice their amount of hourly pay. While this amount of pay is higher, I do not think it is so grossly disproportionate or otherwise so deviant from their hourly pay such as to taint the employees' vote in the election. Twice the hourly rate is nowhere near the promise of seven times the rate that was held objectionable in *Collins & Aikman, supra.* Nor does it approach the amount actually paid in that case.

The fact that the observers were paid by their Employer as well is irrelevant here because the Employer made its decision to pay the union observers after the election. The crucial time is the election time and prior to it. At this time the observers did not and could not have known for sure that they were to be paid by two parties for their services. Moreover, there is no evidence that at the time of the election, they did.

Conclusion

For the above reasons, I recommend that the Employer's objections to the election held on September 29, 1971, insofar as they relate to payments by the Petitioner to its observers, be overruled.

DATED at Chicago, Illinois, this 31st day of July, 1972.

William T. Coleman
Hearing Officer

APPENDIX E

National Labor Relations Board Order Granting Review And Directing Hearing

4-11-72
St. Louis, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

Case 14-RC-6783

QUICK SHOP MARKETS, INC.
Employer
and
RETAIL STORE EMPLOYEES' UNION LOCAL
NO. 655, a/w RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO
Petitioner

ORDER GRANTING REVIEW AND DIRECTING HEARING

On November 12, 1971, the Regional Director for Region 14 of the National Labor Relations Board issued a Supplemental Decision and Certification of Representative in the above-entitled proceeding in which he overruled the objections to the election and certified the Petitioner as the exclusive bargaining representative of the Employer's employees in an appropriate unit. On December 6, 1971, the Employer filed with the Board a request for review of the Regional Director's Supplemental Decision and Certification of Representative with respect to all of the objections. On January 25, 1972, the Board denied the request for review.

On February 3, 1972, the Employer filed with the Board a motion for reconsideration of the Board's denial

of its request for review and, thereafter, the Petitioner filed opposition to the motion.

In its motion for reconsideration, the Employer argues, *inter alia*, that a hearing is necessary to determine the issues raised by the Petitioner's payment of $15 to each of six eligible voters who acted as election observers, relying on the United States Court of Appeals for the Eighth Circuit's decision in *N.L.R.B. v. Commercial Letter*, ____ F.2d ____ (decided January 18, 1972). The Board has accepted the remand ordered by the court in that case.

The Board, having duly considered the matter, finds that this case, arising within the United States Court of Appeals for the Eighth Circuit's jurisdiction, raises arguably similar to those ordered to hearing in *N.L.R.B. v. Commercial Letter*. Accordingly, the Board is of the opinion that issues have been raised with respect to the Regional Director's disposition of the objections relating to the Petitioner's payments of $15 to each of six eligible voters who acted as election observers which can best be resolved by a hearing. Accordingly,

IT IS HEREBY ORDERED that the Employer's motion for reconsideration be, and hereby is, granted, as it relates to the Petitioner's payments to eligible voters who acted as election observers.

IT IS FURTHER ORDERED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the objections relating to the Petitioner's payments to eligible voters who acted as election observers.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the

parties a report to the Board containing resolutions of the credibility of witnesses and findings of fact. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D. C., an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 14 for the purpose of conducting such hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

Dated, Washington, D. C., April 10, 1972.
By direction of the Board

Robert Volger
Associate Executive Secretary

APPENDIX F

Regional Director's Supplemental Decision And Certification of Representative

UNITED STATES OF AMERICA

BEFORE THE NATIONAL
LABOR RELATIONS BOARD
FOURTEENTH REGION

Case No. 14-RC-6783

QUICK SHOP MARKETS, INC.
Employer
and
RETAIL STORE EMPLOYEES' UNION
LOCAL NO. 655, a/w RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO
Petitioner

REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a petition filed on June 28, 1971[1], and the Regional Director's Decision and Direction of Election which issued on August 20, an election was conducted on September 29, among the employees of the Employer in the following-described appropriate collective-bargaining unit:

> All employees of the Employer employed at its retail stores located in the Metropolitan St. Louis area of St. Louis City, St. Louis County, Jefferson County, and St. Charles County, Missouri, including warehousemen, but EXCLUDING store managers, assis-

[1]Unless otherwise specified, all dates appearing herein are in the year 1971.

tant store manager, temporary summer employees, office clerical and professional employees, guards and supervisors as defined in the Act.

The tally of ballots served upon the parties on September 30 discloses the following results:

Approximate number of eligible voters	209
Void ballots	0
Votes cast for Petitioner	99
Votes cast against participating labor organization	90
Valid votes counted	189
Challenged ballots	3
Valid votes counted plus challenged ballots	192

Challenges are not sufficient in number to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for Petitioner.

Timely "Objections to Conduct Affecting Results of Election" were filed by the employer on October 6.[2]

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned Regional Director has caused a full and complete investigation to be made of the objections. All evidence adduced during the investigation, including sworn statements of witnesses, documentary evidence submitted by the parties, and the parties' respective statements of position, have been fully and carefully considered by the undersigned Regional Director, who reports thereon and rules as follows:

Objection 1

In its first objection, the Employer alleges that the

[2]A copy of the Employer's Objections is attached hereto and marked as Exhibit 1.

Petitioner " . . . offered to and did in fact pay economic benefits to eligible voters, intended to induce employees to vote for the Union, thereby impeding a fair, free, and impartial election." In support of this allegation, the Employer contends that Union observers at the election were paid $15 by the Petitioner.

The Petitioner has acknowledged that after the election it paid its observers, but denies that the purpose or effect was to influence employees to vote for it. The Petitioner contends, to the contrary, that such payments were made solely for the additional inconvenience and responsibility attendant upon serving as an observer, and for loss of pay, if any.

The investigation disclosed that six employees served as Union observers, one at each of the polling places established for the election; that when employees were asked to serve as Union observers they were told by the Petitioner's representatives that they would be paid $15 for serving as the Union's observers; and that after the election the Union mailed a check for $15 to each of its observers. The investigation disclosed that at least three Union observers were required to travel to and from polling places several miles distant from their normal working stores, and that at least one Union observer was not paid by the Employer for time spent as an observer at the polls. The investigation established that the payment to the observers was not contingent upon how they voted in the election or on the election outcome. As the investigation disclosed no evidence that payment by the Union of its observers was for any purpose other than to compensate observers for inconvenience, added responsibilities, or any loss in pay, the undersigned concludes that Employer's Objection 1 provides no basis for setting aside the election.[3]

[3]Cf. *General Cable Corporation*, 170 NLRB 1682; *Bordo Products Company*, 119 NLRB 79; *Federal Silk Mills*, 107 NLRB 876.

Accordingly, Objection 1 is hereby overruled.

Objections 2, 4 and 5

In its second objection, the Employer alleges that the Union " . . . campaigned in or near the voting area while employees were casting their ballots." In its fourth objection, the Employer alleges that Union agents positioned themselves, so as to be visible from within the Quick Shop stores that were used as voting places; that Union agents were thus in full view of voters entering and leaving these stores; that Union representatives displayed campaign material, and that Union agents " . . . by their presence, not only intimidated those employees who voted, but those employees who might otherwise have voted." In its fifth objection, the Employer alleges that Union agents, in close proximity to polling places, " . . . attempted to, and did in fact in many cases, intercept eligible voters about to enter the polling places to display and/or force upon them Union campaign material and to engage in other electioneering activity, all of which coerced the voters and interfered with their right to cast ballots under laboratory conditions."

As Objections 2, 4, and 5 all concern alleged electioneering conduct by the Union, occurring in the vicinity of the polls, Objections 2, 4, and 5 will be discussed and considered together.

The Petitioner has acknowledged that it had two of its representatives present on the parking lot at each of the six election polling places from 6 p.m. to 10 p.m., the hours that each of the polls were open. The Petitioner contends, however, that its representatives remained on the parking lot, in front of each polling place store, at all times that the polls were open, and that as the voting took place in the back storage room, at the rear of each store, the presence or activities, if any,

of the Union representatives, did not affect the conduct of the election.

The investigation disclosed, that at polling places #2 (Quick Shop Store at 9138 West Florissant) and #5 (Quick Shop Store at 711 Union Road) Union representatives stationed on the store parking lot spoke to employees about to enter the stores to vote. The investigation disclosed that at polling place #5 during the period the polls were open, Union representatives parked an automobile on the lot in front of the Quick Shop Store, at a distance of about 75 feet from the store's front entrance, and that Union advertisements were attached to the windows of the automobile so as to be visible to persons approaching the store. The investigation also disclosed, that at polling place #5 a Union representative passed out at least ten handbills in front of the store to employees entering, and asked employees to read the handbill.[4] The handbill was distributed to employees entering the store to vote at polling place #5. (Employees leaving the store after voting were also offered the handbill.) The investigation established that only a few of the employees were spoken to by the Petitioner's representative as they were entering the store to vote these employees were greeted and asked if they were there to vote; they were offered the handbill and asked to accept and consider it. One employee stated that he was told that the Petitioner "can do a lot more for you." Finally one employee who acted as a Union observer in the election was asked by a Union representative as he was entering the store to serve as observer, how many voters were at the store where the observer worked, how the observer intended to vote, and how two other named employees, who also worked at the store where the observer worked intended to vote.

[4]A copy of this handbill is attached hereto and marked as Exhibit 2.

The balloting at each of the Employer's stores was conducted in the back storage room, at the rear of each store, and it was in this rear storage room that the voting booth, ballot box, observers and Board Agents were located. Although Union representatives may have been visible to prospective voters on the parking lot as voters approached each store, or visible from within the store, as the voters proceeded toward the back storage room, the voting room itself at each store was virtually entirely isolated from the store and the front parking lot, and neither the interior of the store nor the parking lot would be visible in these backrooms, except for someone standing in the doorway facing away from, instead of towards, the voting area.

The Employer contends, and the Petitioner denies, entering into an agreement not to campaign or engage in electioneering at the polling places. The evidence fails to establish that the Board was party to any such agreement. As there was no established restriction as to the use of the parking lots in front of the stores where balloting was conducted and as the Board agents conducting the election did not issue instructions forbidding electioneering on such parking lots, the undersigned concludes that the electionee ing in the instant case was sufficiently distant and separated from the voting areas so as to not be deemed objectionable.[5] The undersigned further concludes that the remarks made to employees at the polling places were not coercive, contained no misrepresentation of material facts, nor otherwise provide a basis to set the election aside.

Accordingly, Objections 2, 4 and 5 are hereby overruled insofar as they allege and relate to the Union's

[5] *Harold W. Moore d/b/a Harold W. Moore & Sons*, 173 NLRB 1258; *Marvil International Security Service, Inc.*, 173 NLRB 1260.

agents presence at and electioneering on the parking lot areas adjacent to the voting locations.

The Employer further contends that a representative of the Petitioner maintained a list of employees who voted and that such conduct requires that the election be set aside. The Petitioner denies such a list was maintained. The investigation concerning the Employer's contention disclosed that at polling place #5 a Union representative suggested on two occasions, one after the employee voted, the other after the polls had closed, that he was maintaining a count of the number of employees who had voted. In addition, two employees who arrived together to vote at polling place #5 state they saw Petitioner's representative standing on the parking lot with a sheet of paper in his hand. One of the employees states that he looked at the paper held by the Union representative and saw tally marks contained thereon. Both employees assert that the paper contained tally marks only and did not contain any names. The employees state that the Union representative explained that he was maintaining such a tally because after a specified number of employees had voted the Union representative could go home. One of the two employees states that this occurred before they had voted and the other employee states it occurred after they had voted.

Although the Board has held that it is objectionable conduct for a party to maintain a list of names of employees who voted,[6] there is no evidence herein that any such list was being maintained by the Petitioner, nor does the evidence establish that the names of voters were recorded at polling place #5 or at any other polling place. In view of the absence of evidence that

[6] *Piggly-Wiggly #011 and #228 Eagle Food Centers, Inc.*, 168 NLRB 792.

voters names, as opposed to, at most, numbers of voters, was maintained by the Petitioner, and as the investigation established that at most, only one employee was aware of the maintenance of such tally prior to voting, I conclude that this contention by the Employer does not provide a basis to set aside the election.[7]

The Employer further contends that the handbill distributed by the Union at polling place #5 contained a misrepresentation of a material fact which the Employer had no time to rebut.[8] This handbill compared earnings for a period of 96 hours, between the "Quick Shop Rate — $1.60 an hour No Union Contract" and the "Quick Shop Rate — $1.60 an hour with Union Contract." The handbill pointed out that under the "With Union Contract" category, the computation for employee pay, for 96 hours, would be "64 Hours Straight Time 32 Hours Overtime" whereas under the "No Union Contract" category, the computation for 96 hours would be based on "80 Hours Straight Time 16 Hours Overtime". The Employer contends that the Petitioner's misrepresentation is the $1.60 an hour rate, set out in the handbill, as this figure is the starting rate for part-time employees, whereas the Employer's full-time employees, start at a rate of $1.75 per hour. (The Employer also contends that the average part-time rate is $1.64 and the average full-time rate is $1.77 per hour.) The Employer accordingly contends that part-time employees would be misled as to the rate paid to full-time employees by the Employer, and that as this handbill was distributed to employees on the day of the election, as employees were coming to vote, the Employer had no opportunity to reply. The Employer's Personnel Director, John U.

[7] *A. D. Juilliard and Co.*, 110 NLRB 2197.

[8] See Exhibit 2.

Goodman, testified at the pre-election representation hearing in the instant case that part-time employees started at $1.60 per hour and that the Employer employed only ten people, or less, as full-time employees. The investigation further disclosed that on Friday, September 24, five days before the election, the Petitioner mailed a brochure to all employees on the *Excelsior* list, which brochure contained an entire page devoted to the subject of employee pay.[9] This page of the brochure likewise invites employees to compare wages, and also states, in more explicit terms, that the "full-time starting rate (over 25 hours)" for Quick Shop employees is $1.60 per hour.

In view of the above, it appears that the Petitioner's handbill did not contain any material misrepresentation of fact within the Petitioner's special knowledge. Further it appears that the employees were in a position to know the truth of the facts asserted. Finally as this same information which is alleged to constitute the material misrepresentation was disseminated to all unit employees 5 days before the election, the Employer did have an adequate opportunity to reply. Accordingly the undersigned Regional Director concludes that the information contained on the handbill does not constitute a basis to set aside the election.[10]

Accordingly, Objections 2, 4 and 5 are hereby overruled in their entirety.

Objection 3

In its third objection, the Employer alleges that

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[9]A copy of this page of the brochure is attached hereto and marked Exhibit 3.

[10]*Hollywood Ceramics Company, Inc.*, 140 NLRB 221; *Wiley Manufacturing Company*, 174 NLRB No. 30; *General Electric Company*, 162 NLRB 912.

". . . Union officials, agents, members, and supporters entered the polling area and offered to, and did in fact, give free food and beverage to all present. . ." including Board agents, observers, and eligible voters, and that "during this time, the said Union officials, agents, members, and supporters premeditatedly engaged in conversation with the Board agents, observers, and eligible voters who were waiting to cast their ballots."

During the course of the investigation of the objections, no evidence was submitted or adduced to support this allegation. Of 36 witnesses interviewed in the course of the investigation, none stated that any such occurrence took place.

Accordingly, as Objection 3 is unsupported by the evidence, it is hereby overruled.

Conduct Not Specifically Alleged In The Objections

Evidence of certain other conduct disclosed by the investigation has been considered, and is ruled on herein, as the Regional Director is not limited to specific issues raised by the objections.[11]

The investigation disclosed that the Petitioner sent invitations in the mail to employees of the Employer inviting them to attend a "Second Annual Monte Carlo Party" on Saturday, September 25.[12] This invitation stated that prizes would be given away at the end of the evening, including " . . . color TV, radios, bicycles, drills, fishing tackle, and rods, etc."

As the investigation disclosed that the party was for the full membership of the Petitioner in the Greater St. Louis area and was not restricted to employees of

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[11] *International Shoe Company*, 123 NLRB 682.

[12] A copy of the invitation is attached hereto and marked as Exhibit 4.

the Employer, and as there was no evidence that the offer of prizes was contingent in any way on how employees voted in the election or the results of the election, the undersigned concludes that the issuance of the invitations by the Petitioner to attend the Monte Carlo party, does not constitute grounds for setting aside the election.[13]

CONCLUSION AND CERTIFICATION OF REPRESENTATIVE

The undersigned, having overruled all of the Employer's objections, and the investigation having failed to disclose evidence of other conduct which would constitute grounds for setting aside the election,

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that Retail Store Employees' Union, Local No. 655, affiliated with Retail Clerks International Association, AFL-CIO, has been designated and selected by a majority of the Employer's employees in the unit described below, as their representative for purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act, as amended, said labor organization is the exclusive representative of all the employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. The bargaining unit is:

> All employees of the Employer employed at its retail stores located in the Metropolitan St. Louis Area of St. Louis City, St. Louis County, Jefferson County, and St. Charles County, Missouri, including warehousemen, but EXCLUDING store managers,

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[13] *Bordo Products Company, supra.*

assistant store managers, temporary summer employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

Signed at St. Louis, Missouri this 12th day of November 1971.

/s/ Joseph H. Solien, Regional Director
National Labor Relations Board
Region 14
Room 448, 210 North 12th Boulevard
St. Louis, Missouri 63101

EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
FOURTEENTH REGION

Case No. 14-RC-6783

QUICK SHOP MARKETS, INC.,
Employer,
and
RETAIL STORE EMPLOYEES' UNION,
LOCAL NO. 655, affiliated with
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO,
Petitioner.

OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

COMES NOW QUICK SHOP MARKETS, INC., herein called Employer, and pursuant to § 102.69(a) of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, files this its Objections to Conduct Affecting Results of Election conducted in the above styled and numbered case on September 29, 1971, and as grounds in support thereof, alleges the following objectional conduct by RETAIL STORE EMPLOYEES' UNION NO. 655, affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, herein called Union.

I

The Union offered to and did in fact, pay economic benefits to eligible voters, intended to induce the employees to vote for the Union, thereby impeding a fair, free and impartial election.

II

Union officials, agents, members and supporters actively campaigned in or near the voting area while employees were casting their ballots.

III

During the voting period, Union officials, agents, members and supporters entered the polling area and offered to, and did in fact, give free food and beverage to all present (Board agents, observers and eligible voters). During this time, the said Union officials, agents, members and supporters premeditatedly engaged in conversation with the Board agents, observers and eligible voters who were waiting to cast their ballots.

IV

The balloting took place in the Employer's stores, which are totally open to public view through the front glass wall. During the balloting, Union officials, agents, members and supporters positioned themselves in cars visible from the stores, and in full view of voters entering and leaving. Some of the Union officials, agents, members and supporters, and their cars, displayed Union identification and campaign material; by their presence, they not only intimidated those employees who did vote, but those employees who might otherwise have voted.

V

Union officials, agents, members and supporters positioned in a close proximity to the polling places attempted to, and did in fact in many cases, intercept eligible voters about to enter the polling places to display and/or force upon them Union campaign material and to engage in other electioneering activities, all of which coerced the voters and interfered with their right to cast ballots under laboratory conditions.

The above enumerated acts and misconduct were

deliberately designed to, and did in fact, destroy the laboratory conditions so often promised by the Board and required by the Courts, prevented the conduct of a fair, free and impartial election, and were deliberately designed to, and did in fact, interfere with the employees' freedom of choice. Therefore, the results of the election did not reflect the uncoerced desires of the employees of the Employer.

WHEREFORE, promises considered, the Employer respectfully requests that the Regional Director promptly cause an investigation to be conducted and thereafter set aside the results of the election held on September 29, 1971, and direct that another election be conducted at such time as the Regional Director may determine.

DATED this 4th day of October, 1971, at Tulsa, Oklahoma.

Respectfully submitted,

/s/ C. A. Kothe
Kothe and Eagleton, Inc.
Attorneys for Employer
204 Philtower Building
Tulsa, Oklahoma 74103

CERTIFICATE OF SERVICE

I, C. A. Kothe, attorney for Quick Shop Markets, Inc., Employer herein, hereby certify that a true and correct copy of the foregoing Objections to Conduct Affecting Results of Election was served on the following parties by certified mail, postage prepaid, by depositing same in the United States Mail at Tulsa, Oklahoma, on the 4th day of October 1971, addressed as follows:

Retail Store Employees' Union, Local
No. 655, a/w Retail Clerks International
Association, AFL-CIO
Attention: Mr. Robert J. Littchen
1401 Hampton Avenue
St. Louis, Missouri 63139

Mr. John Goffstein
Attorney at Law
Bartley, Goffstein, Marshall & Bollato
130 South Bemiston
St. Louis, Missouri 63105

/s/ C. A. Kothe

EXHIBIT 2

COMPARE YOUR PAY!

Example: Clerk works four 12 hour days or 48 hours per week. In a two-week period, here's a comparison of clerk's gross pay for 96 hours work.

	GROSS PAY	*96 Hour Breakdown*
Quick Shop Rate — $1.60 an hour, No Union Contract	$166.40	80 Hours Straight Time 16 Hours Overtime
Quick Shop Rate — $1.60 an hour With Union Contract	$179.20	64 Hours Straight Time 32 Hours Overtime
Current Union Rate in Food Industry — $3.17 an hour	$354.88	64 Hours Straight Time 32 Hours Overtime

IT DOESN'T COST.
IT PAYS TO BELONG TO RETAIL CLERKS 655

EXHIBIT 3

LET'S COMPARE

WAGES

Local 655 negotiated contracts	Quick Shop
*Full time starting rate (over 25 hrs.) $2.25 per hour (average). Part time starting rate (less than 25 hrs.) $2.05 per hr. (average).	$1.60 per hour.
Wage rates are opened for increases at the end of each contract.	No specific pay policy for periodic review.
Periodic incentive wage increased during first 24 months of employment IN ADDITION to annual raises as negotiated by the union.	The company has boosted wages to comply with federal minimum wage laws under which they must operate.

*NOTE: The average represents all 11,000 members of Local 655. Specifically, in our Food Division, right now the starting wage for a full time clerk (one who works over 25 hours) is $3.17½ per hour. That graduates upwards at periodic intervals to $4.75 per hour (or $190 per week) effective April, 1973. Part time clerks now earn a minimum of $2.60 per hour which graduates up to $3 per hour in 520 hour intervals. Effective April, 1973, the starting rate for part time workers will go from $3.15 to $3.55 per hour, again in steps depending on the total hours worked.

PREMIUM PAY

Local 655 negotiated contract	Quick Shop
Sunday — double time.	Sunday — straight time.
Holiday — double time and a half.	Holiday — straight time.
If you have to work on scheduled day off — time and a half.	No premium pay for working on any off days.

Overtime Pay	
Time and a half after eight hours per day or if you don't work eight hours each day, time and a half after a total of 40 hours each week.	Time and a half only after a total of 40 hours per week.
Example: If you work four 12 hour days, you would be paid for eight hours straight time and four hours overtime per day or a total of 32 hours at straight time and 16 hours at time and a half.	Example: If you work four 12-hour days, you would be paid for 40 hours at straight time and only 8 hours at time and a half.
Accurate system which allows employee to verify his overtime.	No system for employee to verify overtime.
Night Rate	
Clerks receive $1.30 per hour over regular hourly wage for work between 11 P.M. and 7 a.m.	No extra pay for night work.

EXHIBIT 4

Retail Clerks Local 655
cordially invites you and your guest
to be our guests at our
SECOND ANNUAL
MONTE CARLO PARTY
on
Saturday, September 25, 1971
Machinists' Hall, 12365 St. Charles Rock Road
(see map on reverse side)
7 p.m. until ?

Admission is free if you present this card. It covers you and your date. This is a very special party, one where hundreds of our members and their guests come together just to have a good time. There will be games (with play money), set ups, dancing and over 200 (very real) prizes (color TV, radios, bicycles, drills, fishing tackle and rods, etc.) to be given away at the end of the evening. And anytime during the evening, if you are winning, you can actually buy gifts for pre-determined amounts with your play money winnings.

Come on out and join us. We promise no high pressure sales talk, just a great time! See you then!?